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OFFICE OF THE
GENERAL COUNSEL
ADJUTANT GENERAL

April 26, 2000

Secretary
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, Maryland 20852

Re: Proposed Revision of Fee Schedules -- FY 2000

Dear Sir:

The National Mining Association (NMA) submits these comments in response to the Nuclear Regulatory Commission's (NRC) proposed revisions to the licensing, inspection and annual fees for Fiscal Year (FY) 2000. 65 Fed. Reg. 16249 (March 27, 2000). NMA notes that the annual fees for uranium recovery licensees will increase somewhat for FY 2000. Yet NMA remains concerned about the underpinnings of the fee structure, in particular, the serious inequities caused by the Omnibus Budget Reconciliation Act of 1990 (OBRA) mandate that NRC recover approximately 100 percent of its budget each year. Even though the increase in Annual Fees is not extreme, as discussed below the new Project Manager cost recovery system will impose extreme increases in Hourly Fees. In light of the current circumstances facing the uranium recovery industry, NMA is very concerned by the proposal's potential impact on the uranium recovery industry. NRC must immediately revise the Project Manager cost recovery system and pay careful attention to the potential further adverse impact of these new fees on the financial health of the uranium recovery industry as it proceeds with this rulemaking process.

NMA represents producers of most of America's coal, metals, industrial and agricultural minerals; manufacturers of mining and mineral processing machinery and supplies; transporters; financial and engineering firms; and other businesses related to coal and hardrock mining. These comments are submitted by NMA on behalf of its member companies who are NRC licensees and who are adversely affected by the NRC fee regulations. These members include the owners and operators of uranium mills and mill tailings sites and in situ uranium production facilities.

NMA has commented extensively in the past on NRC's fee allocation system. The issues raised by the FY 2000 proposal are similar to those of prior years, and therefore, these comments

incorporate by reference NMA's prior comments (and those of its predecessor organization the American Mining Congress).¹

Annual Fees

NMA's primary concern with the fee system continues to be the lack of a reasonable relationship between the cost to uranium recovery licensees of NRC's regulatory oversight program and the benefit derived from such services. As NMA has commented in the past, it is a fundamental principle of law that there must be a reasonable relationship between the cost to licensees of a regulatory program and the benefit derived from regulatory services.²

Too heavy a burden is falling on uranium recovery facilities, particularly those sites awaiting NRC approval of reclamation plans or those on "standby." Given the complex regulatory scheme and numerous license conditions imposed on these sites, it is rarely a matter of licensee discretion when to operate or finalize closure of a site. Indeed, the realities of the uranium market are a large determinant in whether a licensee ceases operations, goes on standby or begins decommissioning. Sites that are on standby or awaiting approval of reclamation plans require minimal oversight yet must continue to pay an annual fee that is clearly not commensurate with the benefit of holding the license.

This problem of the lack of reasonable relationship between annual fees and services rendered by NRC is exacerbated as more states become Agreement States, leaving fewer NRC licensees to bear an even greater share of the burden. For example, for FY 2000, the annual fee for uranium recovery licensees would increase from \$131,109 in FY 1999 to \$132,000 for Class I facilities and from \$109,000 in FY 1999 to \$111,000 for Class II facilities. These increased annual fees are not due to an increase in the amount to be recovered in FY 2000. In fact, the total amount to be recovered for FY 2000, is less than the amount estimated for recovery in FY 1999. The increase is due mostly to the State of Ohio becoming an Agreement State in August 1999. The current system, in effect, gives preferential treatment to licensees in Agreement States.

NMA acknowledges that without legislative changes to OBRA, there is no way to alleviate completely licensees' major concerns about the fairness and equity of the NRC fee schedule. NMA is pleased that NRC has followed up the promise Chairman Jackson made in her

¹ These comments are dated May 13, 1991, May 29, 1992, February 4, 1993, May 24, 1993, July 19, 1993, August 18, 1993, June 9, 1994, April 19, 1995, February 27, 1996, March 27, 1997 and May 3, 1999.

² NRC's authority to prescribe fees for "regulatory services" under 10 CFR 170 is based on the Independent Offices Appropriation Act of 1952 (IOAA), 31 USC 9701. To be valid under the IOAA, a fee must "be reasonably related to, and may not exceed the value of the service to the recipient, whatever the agency's costs may be." Central & S. Motor Freight Tariff Ass'n v. United States, 777 F.2d 722, 729 (D.C. Cir. 1985).

written response to a question from the Senate Subcommittee on Clean Air, Wetlands, Private Property, and Nuclear Safety where she indicated that the OBRA should be amended to address fairness and equity concerns:

The Commission has determined that reducing the percentage amount the NRC must recover through fees accomplishes the goal of reducing the financial burden on NRC licensees attributable to fairness and equity issues while allowing the NRC to budget for activities which support necessary government functions or national policy requirements. We have notified the Office of Management and Budget that if Congress does not enact such legislation in FY 1999, the Commission intends to develop, as part of our FY 2000 budget request, a legislative proposal to revise the Omnibus Budget Reconciliation Act of 1990 (OBRA-90) to reduce the percentage amount of budget authority that the NRC is required to collect in fees. Based on previous work, the collection requirement could be revised to remove 10 percent of the agency's budget authority from the fee-based category, in addition to amounts appropriated from the Nuclear Waste Fund and for regulatory reviews and other assistance provided to DOE.

October 7, 1998, Response from Commissioner Shirley Jackson to Senate Question 34 (A).

NMA is pleased that NRC has now submitted a legislative proposal to address the inequities in the fee system as indicated by Chairman Jackson and as recommended in NRC's 1994 Report to Congress regarding changes to OBRA.³ Similar to Chairman Jackson's answers to questions from Congress, the NRC Report concluded that OBRA should be modified to relax the 100 percent budget recovery requirement and remove certain costs from NRC's fee base, thereby eliminating many of the inequitable burdens imposed on NRC licensees. NMA is committed to assisting NRC in moving this legislation through the congressional process.

This problem of the lack of reasonable relationship between annual fees and services rendered by NRC being exacerbated as more states become Agreement States and more sites are decommissioned, leaving fewer NRC licensees to bear an even greater share of the burden, while obvious still has not initiated any sort of aggressive response from NRC. In its typical reactionary response to difficult issues, NRC appears to have no plan to deal with this situation. In the NRC Office of Inspector General's (IG) briefing to the Commission on its 1993 Fee Audit, the IG staff stated:

³ NRC, "Report to Congress on the U.S. Nuclear Regulatory Commission's Licensee Fee Policy Review Required by the Energy Policy Act of 1992," February 1994 (NRC Report).

It is our understanding that no long-range plan has been prepared by NRC to address these potential effects. The Commission may be interested in determining the economic implications of future higher license fees and a declining number of licensees . . . If one category of licensees is exempted from paying the fees, a burden is created in the form of higher fees which must be borne by other licensees.

Transcript of December 10, 1993, Briefing by IG on Fee Audit.

NRC needs to determine an equitable way of dealing with the scenario that could result in the last licensee having to pay for the entire program that is beginning to play out in the uranium recovery area. For example, there are only three conventional mills and while the number of in-situ leach licensees had increased in FY 1999 from six to seven, that trend has already ended due to the low price of uranium and the costs associated with NRC licensing fees.

Project Manager Costs

Under the proposed rule, the hourly rate applicable to the uranium recovery category of licensees will increase from \$140 in FY 1999 to \$143 for FY 2000. (65 Fed. Reg.16252.) NMA commented last year on the proposal to charge licensees for "Project Manager Costs." More specifically, NMA was concerned that the changes to "Project Manager Costs" could double the hourly rate costs incurred by licensees. As evidenced by licensees' bills for the First Quarter 2000, it appears that such "Project Manager Costs" far exceed our most conservative estimates of such costs, mostly due to the fact that licensees are being charged for Project Managers' (PM) "generic activities" in spite of the fact that the final 1999 fee rule indicated licensees would not be charged for PM involvement in such "generic activities." Specifically, the final rule gave a fairly detailed example of the new types of activities subject to cost recovery:

Examples of PM activities which will be subject to Part 170 cost recovery are **those associated with oversight of the assigned license or plant** (e.g., setting work priorities, planning and scheduling review efforts, preparation and presentations of briefings for visits to NRC by utility officials, interfacing with other NRC offices, the public, and other Federal and state and local government agencies, and visits to the assigned site for purposes other than a specific inspection), and training. (Emphasis added.)

64 Fed. Reg. 31460. Certainly, nothing in the final rule indicates that licensees would be charged for PMs' activities such as work on the Combined Federal Campaign or work for another branch/office. The only time the final rule mentions "other NRC offices" is in the above quoted language where interfacing with other NRC offices is given as an example of an activity associated with oversight of the assigned license or plant. In no way can that language be

stretched to mean the licensee should expect to pay for their Project Manager's activities to support other offices having nothing to do with the assigned license. In reviewing the NRC directive on "Fee Billing for DWM Project Managers," it seems virtually no activities the PM engages in are excluded from cost recovery. Despite the language in the FY 1999 final rule that rulemaking activities will not be subject to PM fee recovery, in the directive there is a RITS [Regulatory Information Tracking System] code for "rulemaking oversight."

As discussed in some detail in these comments, costs that have no relationship to, nor provide no benefit to the licensee should not be charged to the licensee. To the extent that NRC is required to recover such costs under the Omnibus Budget Reconciliation Act, these costs are more appropriately recovered via the Annual Fee. Recovery through the Annual Fee allows such costs to be spread more equitably across a range of licensees, rather than punishing a licensee who, though no fault of its own, has been assigned a PM engaged in a lot of "extracurricular activities." This problem is further exacerbated when a PM "manages" only one licensee with the result that the licensee must pick up all of the overhead type costs associated with this individual PM. A similar inequity results when a licensee's PM is only a "part-time" PM, a technical person who has been assigned a licensee or two but who spends the majority of his/her time doing technical work not related to the licensed site(s) they manage. If that technical person was not also a part-time PM, the licensee would not be charged for the technical work that does not relate to its license but under this new rule, it appears the licensee(s) will be charged all of it. The NRC's apparent policy of charging for PMs as noted above is disingenuous at a minimum and because it is essentially presenting bogus bills to licensees, from a more extreme point of view verges on fraudulent assessment of costs to licensees.

NRC is supposed to be working to solve the current inequities with its fee system, not creating new inequities. NRC cannot defend this proposal on any reasonable basis much less as an attempt to shift costs from Annual Fees to Hourly Fees since there is no offsetting decrease in Annual Fees that corresponds to the incredible increase in hourly fees that licensees discovered in the latest quarterly bills. NRC must cease this wholly unjustified and *ultra vires* implementation of its OBRA responsibilities at once.

NMA requests that NRC continue its efforts to provide invoices that contain more meaningful descriptions of the work done by NRC staff and NRC Contractors. With hourly rates as high as \$143, NRC should be held to at least the same standard of accountability to its licensees as the private sector is to its clients. In the private sector, adequate explanations and dates are provided to clients in order for clients to fully understand what was done and when it was done. This type of billing system allows costs to be specifically identified. NMA recognizes that implementing such a system would require major revisions to NRC's entire computer billing program, but it is a change that would serve well NRC, its licensees and the public. NRC will not accept licensee inconvenience as an excuse for failure to properly fulfill its license responsibilities so inconvenience provides NRC with no excuse either.

NMA urges the Commission to continue to pursue legislative efforts with Congress to modify OBRA to make assessment of fees by NRC more equitable across the board. Also, the

Commission must revise the PM cost recovery system because that system is contrary to OBRA and is creating unexpected additional inequities. In fact, it is our understanding that some licensees are considering not paying the first quarter bills until this new system is clarified and verified. Furthermore, NMA intends to discuss this matter both with individual members of the Commission as well as the appropriate Congressional oversight committees. Given the current state of the domestic uranium recovery industry, the new inequities posed by the PM cost recovery system could be the last nail in the coffin. Finally, given this situation, we strongly recommend that NRC accept recommendations in the NMA "White Paper" to relinquish jurisdiction of ISL wellfield mining activities to the States, thereby allowing NRC to reduce staff, Annual Fees, and "Project Manager Costs" to levels commensurate with the activity being regulated. If you have any questions or if we can be of assistance, please contact me at 202/463-2627.

Sincerely,

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